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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1617

SAM H. JOHNSON, *Petitioner*,

v.

PENROD DRILLING COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 21, 1975.

OPINION BELOW

The original opinion of the Court of Appeals is not reported. It was amended on denial of Appellee, Johnson's Petition for Rehearing and the amended opinion is reported at 469 F.2d. 897 (5th Cir. 1973). En banc rehearing was ordered on Petitions by all parties, 478 F.2d 1208 (5th Cir. 1973). The en banc rehearing rehearing opinion of the Court of Civil Appeals is reported

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at 510 F.2d 234 (5th Cir. 1975). Copies of these opinions are appended and comprise the Appendix to this Petition.

JURISDICTION

Review is sought of the Judgment of the Court of Civil Appeals rendered on March 21, 1975. The Court's original opinion was rendered on November 21, 1972 and amended on March 29, 1973. En banc rehearing was ordered on April 18, 1973. En banc rehearing of this judgment was denied on May 12, 1975. Jurisdiction of this Court is invoked under Title 28, U.S.C. 1254(1).

QUESTIONS RAISED

I. Is evidence of the impact of inflation upon Petitioner's future wage earning capacity admissible and if not, should the future impact of inflation upon interest and discount rates be considered in discounting any award to present cash value.

II. Should the Seventh Amendment be construed so as to deny a seaman's right to a non-jury trial of his maritime action for personal injury brought pursuant to Rule 9(h), F. R. Civ. P., when his Original Complaint, which contained a jury demand, was amended with leave of court, without objection, to withdraw any judicial basis to permit a jury trial.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Art. III, Sec. 2, reads in part:

"The judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction; . . ."

United States Constitution, Seventh Amendment, states:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

1 U.S. Statute 76 provides in part:

"and the trial of issues of fact, in the district courts, in all causes except civil cases of admiralty and maritime jurisdiction, shall be by jury."

Rule 9(h), F. R. Civ. P., states:

"Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38 (e), 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C.§1292(a) (3), to admiralty shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)."

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Rule 15(c), F. R. Civ. P., states:

"Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading . . ."

Rule 38(a), F. R. Civ. P., states:

"Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Rule 38(b), F. R. Civ. P., states:

"Demand. Any party may demand a trial by jury of any issue triable of right by a jury serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party."

Rule 38(e), F. R. Civ. P., states:

"Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in admiralty or maritime claim within the meaning of Rule 9(h)."

Rule 39(a), F. R. Civ. P., states:

"By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the

parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Rule 43(a), F. R. Civ. P., states:

"Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Notes of Supreme Court Advisory Committee on Rules 1966 appended to Rule 9(h) F. R. Civ. P. See Appendix.

STATEMENT OF THE CASE

Petitioner originally brought this suit alleging Jones Act violations and unseaworthiness in admiralty, and requested a jury trial. The case lay dormant for a period of time pending an interlocutory appeal on a venue question. Upon the conclusion of this appeal, and prior to the

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trial, the Plaintiff, with leave of Court and without objection from the Defendant, amended, designating this case as falling within the ambit of the court's admiralty jurisdiction pursuant to Rule 9(h) F.R.C.P. The Court removed the case from the jury docket, and it was tried to the Court resulting in judgment for the Plaintiff.

The Court of Appeals reversed the judgment of the District Court and remanded the case for retrial holding that the seaman Plaintiff would be required to try his case before a jury.

The opinion of the Court below is set out in the Appendix hereto.

This was done in spite of the fact that there is no diversity of citizenship between the parties.

REASONS FOR GRANTING THE WRIT

1. This case merits review by this Court on certiorari because the authoritatively unsupported opinion of the Court below in this admitted case of first impression initiates a heretofore unheard of Constitutional right to trial by jury in admiralty, which if permitted to stand, will disrupt the non-jury dockets of the Federal Courts nationwide.

2. This case merits review by this Court on certiorari because the decision of the Court of Appeals is in direct conflict with the opinion of this Court in *Fitzgerald v. United States Lines*, 374 U.S. 16, 83 S.Ct. 1646 (1963), as well as prior determination by the Court below in *Texas Menhaden Co. v. Palermo*, 329 F.2d 579 (5th Cir. 1964), and furthermore in direct conflict with the pronouncements of this Court's Advisory Committee on

the interpretation of the appropriate Federal Rules construed (Rule 9(h), F.R.C.P., Advisory Committee Notes).

3. This case merits review by this Court on Certiorari because the decision of the Court of Appeals is in direct conflict with the opinion of this Court in *Chesapeake & Ohio Railway v. Kelly,* 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed 1117 (1916) and *Grunenthal v. Long Island Railway Company* 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed. 2d 309 (1968).

4. This case merits review by this Court on Certiorari because the decision of the Court of Appeals has departed from the accepted and usual course of judicial proceedings requiring equal application of the law to all parties in that while the Court denies admissibility of the impact of inflation on Petitioner's future wage earning capacity it gives to Respondent the effect of that very same inflation in requiring the Trial Court to discount awards by present interest rates.

ARGUMENT

Simply put, this Court is asked by Petitioners to preserve the right of a seaman to designate his maritime cause of action for damages pursuant to Rule 9(h) and to try his case to an admiralty judge sitting without a jury.

The holding of the Court below is to the effect that once the Plaintiff demands a trial by jury in an admiralty action, the Defendant acquires a Constitutional right of trial by jury by reason of the Seventh Amendment, even though there is no diversity. In so holding the Court below has overruled more than one hundred and fifty years of unquestioned precedent; has held directly in contravention to the expressed provisions of Rules 9(h), 15

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and 38(e), F.R.C.P.; and has utterly disregarded the unequivocal expressions of this Court's Advisory Committee on the Rules of Federal Procedure.

THE SEVENTH AMENDMENT

The Court below was profoundly incorrect in determining that the Seventh Amendment created in the Defendant a right of trial by jury in this case. The Seventh Amendment creates nothing. It "preserves" a right of trial by jury where one existed at common law.

The Seventh Amendment never has, and never was intended to have application to suits in admiralty. It applies to suits at common law (i.e. the common law of England as of 1791).[1] As stated by Moore[2] "since the Amendment (Seventh) deals only with suits at common law, it has no application to suits in equity or admiralty."

The Seventh Amendment neither enlarged nor abridged the right of trial by jury, but rather it preserved it where it theretofore existed.[3] It is therefore clear that the Seventh Amendment's thrust is limited to "suits at common law."[4] Completing the circle, it is therefore patently clear that the Constitution does not, and never has required a

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1. *United States v. Wonson* (C.C.D. Mass. 1812), 1 Gallison 5, 20, 28 Fed. Cas. 745, 750, No. 16,750.

2. 5 *Moore's Federal Practice*, Sec. 38.08[5], p. 81; and *Crowell v. Benson* (1932), 285 U.S. 22, 45, 52 S.Ct. 285, 76 L.Ed. 598.

3. *Ibid*, p. 83.

4. Note the Constitutional provision covering admiralty cases is Article III, Sec. 2, which provides that the judicial power of the United States shall extend to all cases of "Admiralty and Maritime Jurisdiction."

trial by jury in a civil proceeding in admiralty.[5] This view has been uniformly adopted by the Courts reaching the question.

The basis for the holding of the Circuit Court that the Defendant is entitled to a jury trial is, as it must be, the Seventh Amendment. The Court, however, overlooks the fact that the Seventh Amendment applies to trials at common law and the only possible basis for a jury trial thereunder is diversity of citizenship. Yet there is *no* diversity of citizenship in this case and thus no basis for the holding of the Circuit Court.

Since it is beyond question that no Constitutional jury trial exists at admiralty, the only possible basis for a jury trial in this case is that of diversity. Yet no diversity of citizenship exists.

NO COURT HAS HELD THAT THE DEFENDANT IS ENTITLED TO A JURY TRIAL IN ADMIRALTY; IN FACT THEY HAVE HELD TO THE CONTRARY

In *Fitzgerald,*[6] this Court made it clear that the Seventh Amendment does not require a jury trial in an admiralty

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5. 5 *Moore's Federal Practice* 2d, Sec. 38.35[2], p. 274; see also p. 269:

> "For reasons subsequently set out in detail there is no constitutional right of trial by jury in cases that are properly within the admiralty jurisdiction."

And see 9 *Federal Practice and Procedure,* Wright and Miller, Sec. 2315, p. 72, which says:

> "There is no right to jury trial, except as provided by Congress or as required by the Supreme Court in the exercise of its supervisory power over admiralty proceedings, on the admiralty side of the Federal Court."

6. *Fitzgerald v. United States Lines,* 374 U.S. 16, at p. 20, 83 S. Ct. 1646 (1963); *Waring v. Clark* (U.S.), 5 How. 441, 460, 12 L. Ed. 226, 235 (1847).

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case. Furthermore, the Court below in an earlier opinion expressly stated that "there is no jury trial in admiralty with the exception of matters covered by 28 U.S.C.A. § 1873."[7] It is contended by no one that Section 1873 has any application to the case at Bar. The above authorities are compelling, indeed *decisive,* yet, the opinion of the Court below makes no mention of them.

OVER ONE HUNDRED YEARS OF PRECEDENCE DOWN THE DRAIN

The holding of the Court below is directly contrary to ancient and settled practice in admiralty cases. The non-jury approach to admiralty was so firmly entrenched in English law prior to the year 1500 that a special statute was passed in 1537 to confer the right of trial by jury to criminal actions in admiralty.[8]

The U. S. Judiciary Act of 1789[9] recognized the non-jury approach to admiralty actions as follows:

> ". . . The trial of all issues of fact in the district courts, in all cases *except cases in equity and cases of admiralty and maritime jurisdiction,* and except as otherwise in proceeding in bankruptcy, shall be by jury . . ." (Emphasis ours)

This Section has come forward in the context of Rules 38(a) and 38(e), which in tandem provide for jury trials in cases where preserved by the Seventh Amendment, but which specifically prohibits the creation of the right of trial by jury in admiralty when none exists by statute.

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7. *Texas Menhaden Co. v. Palermo,* 329 F.2d 579 (5th Cir. 1964).

8. 28 Hen. VIII, c. 15, 1537.

9. 1 Stat. 76 (1789).

THE UNEQUIVOCAL LANGUAGE OF THE RULES REQUIRE REVERSAL

Any inquiry concerning the propriety of the Court of Appeals' interpretation of the applicable Rules of Federal Procedure demands a brief review of the chronology of events in the trial court. On August 30, 1966, Johnson's Original Complaint (R7)[10] was filed, along with a jury demand (R13). On February 23, 1970, Johnson's Amended Complaint containing a 9(h) designation was filed (R26). The Omnibus Order (R31) dated February 23, 1970, granted leave for the filing of the Amended Complaint. The Defendant did file a Motion for Jury Trial (R58) September 2, 1970. The Defendant at no time objected to the Amended Complaints nor did it move to strike Johnson's Amended Complaint containing the 9(h) designation.

It is submitted that the conflict between the Rules of Civil Procedure noted by the Court below does not exist except for the strained construction sought to be applied by that Court.

Rule 9(h) specifically anticipates amendment to add or withdraw an identifying statement as governed by Rule 15. Rule 15(c) specifically adopts the principle of "relation back".

The very thing that happened in this case was anticipated by the Supreme Court Advisory Committee on Rules. This is apparent from the last paragraph of the Advisory Notes which read as follows:

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10. All "R" references are to the "Appendix" filed in the Court below and now certified as the record in this cause by the Clerk of that Court pursuant to the authority of Rule 21(2), Rules of S. C. of U. S.

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> "The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim *is not an irrevocable election.* The rule provides that the amendment of the pleading to add or withdraw an identifying statement is subject to the principles of Rule 15." (Emphasis added)

The specific reference in Rule 9(h) to Rule 38(e) which provides that such rules shall not be so construed as to enlarge the right to trial by jury is significant. Indeed the action of the Court of Appeals in these cases directly contravenes this prohibition.

Once Petitioner had amended his complaint, with leave of Court, and without either timely objection or motion to strike by Penrod, the entire controversy before the trial court was of a non-jury nature so as to require the trial court to apply Rule 39(e) and deny Penrod's Motion for Jury Trial filed on September 11, 1970.

THE COURT OF APPEALS HAS MISCONSTRUED BANKS V. HANOVER

The only authority relied upon by the Court of Appeals to support its reversal of the trial court is the opinion of the District Court in *Banks v. Hanover.*[11] It is respectfully suggested that any analysis of such opinion only indicates that should Penrod have desired to try this case to a jury it should have timely filed an objection to Petitioner's amended complaint as was done there. *Banks* does not stand for the proposition that Penrod was entitled to a trial by jury on the pleadings as they existed at the time this case went to trial. Careful analysis of Banks clearly

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11. *Banks v. Hanover Steamship Corporation* (D. Md. 1967), 43 F.R.D. 374.

indicates the propriety of the action of the trial court and demonstrates Penrod was not without appropriate remedy, to-wit, objection to filing and motion to strike.[12]

EQUAL TREATMENT UNDER LAW

The Trial Court found Petitioner Johnson to be completely disabled by the injuries he suffered in 1965. At the time he was disabled, he was working for the Respondent on its drilling vessel. His injuries permanently destroyed his wage earning capacity. Plaintiff was then 33 years old with a work-life expectancy to age 65 of 32 years.

While recognizing loss of wage earning capacity to be a proper element of Petitioner's damages, the Court of Appeals has ruled that, for the purpose of measuring this loss, neither judge nor jury may consider future increases in wages over the period of this work-life expectancy. Whether changes reflecting increased productivity or reflecting inflationary factors, the Court of Appeals has ruled Petitioner's calculation of wage losses frozen at the level of his earning at the time of injury.

This ruling ignores the requirements of justice announced in *Chesepeake & Ohio Railway v. Kelly*,[13] and *Grunenthal v. Long Island Railway Company*.[14] Using the necessarily speculative nature of any award for future damages as an all too convenient rationale, the Court of Appeals has overruled its prior decisions in *Cunning-*

12. *Zelson v. Thomforde*, 428 F.2d 1360 (1970, 3rd Cir.) points out the hazards incurred by failure to object to amendment.

13. 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916).

14. 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968).

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ham v. Bay Drilling Company,[15] and *Canal Barge Co., Inc. v. Griffith,*[16] and now holds inadmissible testimony as to wage increases.

What was originally an issue of admissibility of evidence under Rule 43, F. R. Civ. P., has now become an issue of equal protection of law. Wages are obviously effected by inflation. Interest rates responds to inflation in the same way. Higher rates accompany higher prices since no investor wants to lose purchasing power while his money is invested. The Court of Appeals has given such inconsistent and contradictory treatment to wages, and interest and discount rates as effected by inflation as to require reversal of its judgment below.

The Court of Appeals itself recognizes that price inflation not only effects wages but also directly effects interest rates:

> "Then too, if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur. . . ." 510 F.2d at 236

Focusing only on the interest Petitioner may earn on an award, the Court of Appeals completely ignored the interest rate by which that amount is discounted to present cash value, as required by *Kelly*. In doing this, the Court specifically overrules its decision in *Blue v. Western Railway of Alabama.*[17] The interest Petitioner may earn year

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15. 421 F.2d 1398 (5th Cir. 1970).

16. 480 F.2d 11 (5th Cir. 1973).

17. 469 F.2d 487 (5th Cir. 1972).

to year by investing the amount of his award fluctuates as those rates respond and adjust to inflation. The rate at which his award is discounted, however, is applied but once, at the time of judgment, to reduce the Plaintiff's award to present cash value. While recognizing that such rate has built into it the inflationary rate, the Court of Appeals nevertheless specifically overruled *Blue* and requires such inflated discount rate to be used to reduce the amount of Plaintiff's award. This discount rate must be purged of its inflationary contents if Plaintiff's future wages are to be so treated by the Court.

In *Blue*, the Court of Appeals was fully cognizant of this relationship between interest rates and inflation. There, the Court recognized that, with interest rates at their highest in one hundred years, it would be wrong to discount an award for future damages by such an inflated rate. The Court of Appeals has now reversed itself on this issue "to attain the desired simplicity and efficiency of trial procedures".[18]

There can be no virtue in "simplicity and efficiency" of trial procedures which provides such disparity of justice to litigants. Petitioner's earning capacity can only be measured in the wages he would have earned but for his injury. Productivity increases and price inflation have caused wages to increase in the past and all of the testimony offered by both economists testifying for Petitioner and Respondent was that wages would increase in the

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18. 510 F.2d at 237. The practical effect on a wage earner entitled to an award for future wage loss is staggering. Loss of future wages amounting to $500,000, discounted at 2% for 32 years, yields an award of $356,389; at 4% the award is $267,005; at 6%, the award is $209,050; and at 8%, approximately the interest rate presently available, the award is $169,949.

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future. The Court of Appeals denies admissibility to such testimony. That same inflationary rate causes interest rates to be their highest in over a century. This high rate is a hedge against future inflation considered by the Court of Appeals to be too speculative. If inflation is too speculative when considering future wages, it is too speculative when included in the discount rate and must be eliminated therefrom. It has never been a tenent of our jurisprudence that efficiency of procedures outweighs equal treatment of substantive rights. This point was clearly established in *Kelly*. In simple fairness, Respondent should not be protected from inflation which may increase the amount of Petitioner's future earnings, while, at the same time, it is granted the benefits of inflation to reduce the amount of Petitioner's award.

Interest rates and discount rates always include an expectation of future inflation. As nothing more than a measurement of the earning power of money, interest rates anticipate the future rate of inflation so that the investor, in fact, will be able to buy more after his investment than before. Present discount rates which already include anticipated future inflation are not and cannot in all fairness be equated with present wages. Such wages are paid for past work. They do not include a hedge against future inflation. Future wages, however, do represent work to be done in the future and require the same treatment as interest and discount rates.

Petitioner confidently adheres to the position argued later in this Petition that the testimony in issue is admissible. At the very least, however, equal treatment of the question of inflation should be required by this Court. The Court must require an award for future wage losses

be discounted by a rate that eliminates all inflationary influences. Such discount rate represents only the earning power of money invested. It would not include increases in such rate as a hedge against future inflation.

The Court of Appeals further committed error in assuming Petitioner could himself hedge against inflation by investing at inflated interest rate.[19] If Petitioner is given only half of what he is entitled to at the start, how can he ever make himself whole. Whether Petitioner is given the full measure of his damages or half that measure, future interest rates will apply to both sums to the same degree. It is a simple matter, that one man with twice as much principal to invest as another will make twice as much interest on his investment. It is falacious for the Court of Appeals to state that Petitioner will catch up with inflation even if he is started out doubly cursed by its ruling.

ADMISSIBILITY

In dealing with future earning capacity, by definition, the Court must deal with economic considerations that are by their nature speculative. There is no doubt, however, that the Finder of Fact must make such a determination. Loss of future earning capacity is not only a proper element of Plaintiff's damages but, in most cases, is by far the largest single element suffered by a wage-earner whose earning capacity has been diminished or altogether destroyed. Given this necessity, this Court adopts, as a matter of law, a basic assumption that Plaintiff's earning capacity will not change throughout the remainder of his disability. This assumption is not only not suggested

19. 510 F.2d at 236.

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by any evidence in the Record but is totally contrary to all observed facts relating to past and future wage loss. Rather than to allow the testimony of economic experts, as to the various aspects of increases and decreases in Plaintiff's future earning capacity, this Court has ruled such testimony inadmissible. The only ground advanced for this argument is that such testimony is speculative. Plaintiff urges that what is speculative is not that past inflationary trends will continue into the future but that such trends will suddenly stop or be reversed.

Without such expert testimony, the determination of future wage loss must be made solely on the record of wages earned at the time of injury or left to pure conjecture. In *Grigsby v. Coastal Marine Services of Texas,*[20] the Court noted in observing inflationary trends, that an adjustment of damages for economic losses in an admiralty action was too low,

> " . . . Since the computations of present discounted value assume what is so unlikely, that Grigsby's salary will remain constant in this exploding inflated world."

The Court of Appeals has reversed three cases, handed down within the last five years, in arriving at its judgment of March 21, 1975. *Cunningham*[21] and *Canal Barge Co., Inc.*[22] recognized the right of the Finder-of-Fact to consider inflation in arriving at the full measure of damages for Plaintiff's loss of wage earning capacity. *Blue v. West-*

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20. 412 F.2d 1011, Chief Judge Brown and Judge Wisdom of the Fifth Circuit, with the concurrence of Chief Justice Burger sitting by designation.

21. 421 F.2d 1398.

22. 480 F.2d 11 (5th Cir. 1973).

ern Railway of Alabama,[23] recognized the necessity of removing inflation from the interest rate by which an award is discounted.

The The Court of Appeals' decision subverts this Court's decision in *Chesapeake & Ohio Railway v. Kelly*.[24] In *Kelly*, the Court required full compensation for loss of earning capacity. The discount rate required was recognized as the earning power of the amount of the award, not the hedge against inflation.

The judgment of the Court of Appeals denies to Petitioner the full measure of his loss. By failing to admit the competent testimony of expert witnesses, the Court of Appeals requires the Finder-of-Fact to speculate on Future damages. In *Har-Pen Truck Lines Inc. v. Mills*,[25] dealing with the measurement of future earning capacity the Fifth Circuit held:

> "Past earnings are indicative but not conclusively, and defend nts would have us stare fixedly at the past with no thought of change in the future. The jury did not have to ignore the possibility of future increases in earnings, when testimony which it could believe supported such a hypothesis. The jury came no where near stretching that evidence to the limit. If the jury were restricted to the past for its answers, its computations of loss may have to be purely arithmetic; but the jury may look forward as well as backwards, as long as it relies on such relevant and appropriate evidence as is available. In personal injury and death cases, court and jury deal with the inchoate, the intangible, the destroyed potential of

23. 469 F.2d 487.

24. 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916).

25. 378 F.2d 705 (5th Cir. 1967).

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> tomorrows. To ask the jury to be finite about such a future is neither realistic nor is it a judicially sensible ambition. The future is not finite. We live in a world of probabilities and the jury need not ignore them. In the main, a jury's calculation of damages must involve some speculation. Our job on appeal is to inquire whether the jury has exceeded the bounds of the probabilities presented by the evidence."[26]

Dealing specifically with the question of the impact of inflation upon future wages, this court has recently upheld the use of such testimony.[27] In reversing the Court of Appeals for the Second Circuit, this Court specifically approved the Trial Court's consideration of both the use of expert economic testimony and projection of inflationary trends as they effect loss of future earning capacity. The sole issue in *Grunenthal* was the question of the excessiveness of the damages found by the jury. Writing for the majority, Justice Brennan held that,

> "The trial judge on the other hand appraised the evidence on future earnings as sufficient to support an award of $150,000 for loss of future wages, in light of the 'convincing testimony not refuted * * * demonstrating the steady wage increases in recent time for work equivalent to that rendered by plaintiff, and the strong likelihood that similar increases would continue'." 393 U.S. at 160, 89 S.Ct. at 334.

This court, in *Grunenthal* took great pains to set out their own assessment of such evidence as not only admissible, but convincing.

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26. 318 F.2d at 709-10.

27. *Grunenthal v. Long Island Railway Company*, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968).

The Court of Appeals has committed significant error in denying admissibility to testimony relating to the impact of inflation upon plaintiff's wage earning capacity.

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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By _____
Attorneys for Petitioners

APPENDIX A

SAM H. JOHNSON
Plaintiff-Appellee,

v.

PENROD DRILLING COMPANY,
Defendant-Appellant.

JAMES L. STARNES,
Plaintiff-Appellee,

v.

PENROD DRILLING COMPANY,
Defendant-Appellant.

Nos. 71-2243, 71-2245.

United States Court of Appeals,
Fifth Circuit.

March 21, 1975.

Reversed and remanded.

Brown, Chief Judge, and Gewin and Thornberry, Circuit Judges, dissented on the issue of jury trial.

Brown, Chief Judge, and Goldberg and Godbold, Circuit Judges, dissented on the issue of inflation.

Brown, Chief, and Ainsworth and Gee, Circuit Judges, dissented on the income tax issue.

Gee, Circuit Judge, filed a dissenting opinion on the income tax issue.

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PER CURIAM:

I JURY TRIAL

On the jury trial issue, the en banc court adopts the original panel opinion by Judge Simpson in this case, reported at 5 Cir., 469 F.2d 897.

II INFLATION

On November 21, 1972 an opinion by Judge Simpson for the panel was released to the parties and was reprinted in the advance sheets of the Federal Reporter, Second Series. The opinion released on that date contained an extensive discussion of the inflation issue. On petition for rehearing, March 29, 1973, the discussion of inflation in the initial opinion was modified and abbreviated to the language set out at 469 F.2d 904-5. The court en banc now adopts that portion of the full initial panel opinion as released on November 21, 1972, entitled "PROCEEDINGS FOLLOWING REMAND". To facilitate reference thereto, the unpublished portion of that opinion is appended here.

[1, 2] We judicially notice that inflationary conditions in this nation's economy have worsened in the interim between the November 21, 1972 panel opinion and today and we recognize that this accelerating rate of inflation increases the likelihood that inflation could become a predictable condition for the future. Nevertheless, with this added light, we still cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages. The worsening of inflation might as readily foretell a recession or a depression as its continuity. Strong gov-

ernmental counter-measures have been proposed and their efficacy is still unknown. Then too, if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations. In addition to the Second and Sixth Circuit decisions cited in Judge Simpson's opinion, we note that three other circuits appear to agree with this procedure.[1] Cunningham v. Bay Drilling Com-

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1. 1st Cir. Williams v. United States, 435 F.2d 804 (1st Cir. 1970).

3rd Cir. Frankel v. Heym, 321 F.Supp. 1331 (E.D. Pa. 1970), aff'd, 466 F.2d 1226 (3rd Cir. 1972). At p. 1346 the District Court stated:

> The projected inflationary trend is speculation. Plaintiff has used the decade of the 1960's, one of the more inflationary times in the history of our country, as the basis for a projection of over fifty years. It is common knowledge that our Government is and has been attempting to control inflation, even to the point of considering wage and price controls. Economists differ on their predictions. Moreover, plaintiff will have money that can be invested and if inflation continues, the return on the money will be greater, and this would have an offsetting effect.

9th Cir. Furumizo v. United States, 245 F.Supp. 981 (D. Hawaii, 1965), aff'd, 381 F.2d 965 (9th Cir. 1967). In upholding the trial court's refusal to consider inflation, the circuit court stated: "Moreover, the period here in question is 34.6 years . . . and this court knows that less than that long ago there was a period of severe deflation." *Id.* at 971. But *see* the per curiam in Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974), which states in dictum that the trial court may have been in error in failing to fully account for inflation.

See also Yodice v. Koninklijke Nederlandsche Stoom. Maat., 443 F.2d 76 (2nd Cir. 1971), cert. denied, 411 U.S. 933, 93 S.Ct. 1902, 36 L.Ed.2d 393 (1973); and Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970), cert. denied, 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971), cert. denied, 402 U.S. 987, 91 S.Ct. 1660, 29 L.Ed.2d 153 (1971), cert. denied, 402 U.S. 987, 91 S.Ct. 1665, 29 L.Ed.2d 153 (1971), reh. denied, 403 U.S. 924, 91 S.Ct. 2227, 29 L.Ed.2d 703, reh. denied, 403 U.S. 940, 91 S.Ct. 2247, 29 L.Ed.2d 720 (1971).

pany, 421 F.2d 1398 (5th Cir. 1970) is overruled. To the extent that Canal Barge Company, Inc. v. Griffith, 480 F.2d 11 (5th Cir. 1973) announced a contrary view, that opinion cannot stand.[2]

III INCOME TAX

[3] In addition, the court en banc has considered whether on remand the juries in these causes should be permitted to consider evidence and be given an instruction on the impact of income taxes on their calculations of a proper award for loss of future wages. Allowing this subject matter to be considered would require the admission of expert opinion evidence as to what future income tax rates and deductions are expected as well as opinion evidence on what current rates and deductions would be applicable to the subject wage earner during various phases of the jury's future loss calculations. Of necessity, this evidence would have to be accompanied by an instruction from the court as to the application of these rates to such untaxable compensatory elements (and, in some cases, such taxable punitive damage elements) as may be involved in the verdict. To compound the complexity and the jury's difficulty in reducing the proof to a monetary award, the tax effect of contingent attorneys' fees and the taxability of the interest earnings under the annuity principle used to calculate the reduced present value of future wages would have to be analyzed. As a judgmental matter and consistent with our views on inflation, in a case such as those at bar in which the annual wage rate involved (here 8,646.40 and 11,387.10 dollars)

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2. On rehearing, the panel in *Canal Barge* stayed its mandate and deferred consideration of this issue pending our en banc action. 480 F.2d at 34.

is subject to an income tax rate which would not distort projections or result in a windfall recovery, we conclude that justice is better served if these contingencies, variables and predictions are withheld from the jury's consideration.[3]

IV CONCLUSION

[4] The rule on remand thus becomes closely similar to that announced by the panel in Blue v. Western Railway of Alabama, 469 F.2d 487 (5th Cir. 1972).[4] Evidence to be adduced on the issue of future loss earnings should be the predicted gross earnings lost due to defendant's wrong or neglect, without adjustment for taxes, calculated over the projected work-life of the injured party. The evidence of gross earnings should expressly indicate that the proof adduced relates to total earnings rather than to the more familiar "take-home" pay. An instruction by the court may also make this condition clear if it is deemed necessary to avoid the possibility of duplication of the tax element in any award.

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3. For example, who could have predicted that in the present inflationary times both the executive and legislative branches of our national government would be advocating a tax rebate (with proportionately higher benefits to lower income taxpayers), as a means of counteracting a contemporaneous business recession.

4. Our holding in *Blue* should be viewed as in part circumscribed by the nature of that appeal and the issues arising from it. There the appellant urged as error the exclusion by the trial judge of his tendered evidence as to his gross earnings history. The trial judge had instructed the jury to take into account in determining probable lost future earnings only the evidence before it of net wages earned. The appellant in *Blue* did not seek from us a ruling that evidence as to his past net earnings was improper, but rather sought to establish only his right in addition to put before the jury evidence of his gross earnings in the past. We ruled that he should be allowed to do so. The issue as presented by the appeal did not question the admissibility as such of evidence as to past net earnings.

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Blue required the use of an interest rate to reduce future wages to current value which was projected as appropriate "over the period of the remaining worklife of the plaintiff". To attain the desired simplicity and efficiency of trial procedures, we recede from this portion of that decision. The calculated gross future earnings must be reduced to present value by the use of an appropriate interest rate prevailing at the time and place of trial.

The judgments of the district court in both No. 71-2243 and No. 71-2245 are reversed and the causes are remanded for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX
PROCEEDINGS FOLLOWING

Our conclusion that the district court in each case deprived Penrod of its Seventh Amendment right to a trial by jury requires reversal of the judgments entered below with directions that new trials be held before juries unless Penrod consents under Rule 39(a) to non-jury proceedings. We think appropriate regard for husbanding judicial times requires comment upon the manner in which the issue of damages was litigated and decided below, and directions as to procedure after remand.

Dr. Thomas Mayor, an economist, testified for Starnes and Johnson in each trial for the purpose of projecting the plaintiffs' future earnings and prevailing interest rates. He stated that, in his opinion, the wages of the plaintiffs would probably increase at an annual rate of 4.8% for the remainder of their projected work-lives. In addition, he

recommended that the present values of these projected future earnings be computed through the application of a 4% reduction factor. Dr. Mayor selected a 4% factor because an insurance company, if asked to sell to the plaintiffs single payment annuity contracts written to return the average projected earnings of the plaintiffs over their anticipated work-lives, would assume a 4% return on investment.

Dr. Burke A. Parsons, also an economist, testified for Penrod in the Starnes trial for the purpose of rebutting Dr. Mayor's testimony. Dr. Parsons expressed the view that it was impossible to project with accuracy inflationary trends in the economy and in the petroleum industry over the periods representing the remainders of the plaintiff's projected work-lives. He stated that the 4.8% wage increase figure projected by Dr. Mayor was too high. With regard to an appropriate rate to be employed for reducing the future earnings award to present value, Dr. Parsons testified that the then prevailing interest rates of between seven and eight percent per year on blue-chip corporate bonds would provide an acceptable range of reduction factors.

The district court made the following findings of fact as to the estimated future earnings of Starnes:

> "30. Plaintiff was 32 years of age on the day of the accident complained of. He was 37 years old at the time of the trial and had a life expectancy of 34.4 years. In all reasonable probability, plaintiff would have continued to work until age 65.
>
> 31. The wages of one performing the type of work that plaintiff was performing at the time of the accident in issue is likely to increase at the annual rate

of 4.8% per annum. This percentage of annual increases in wages was the rate of increase of such wages from 1946 to 1969; and was the rate of annual increases which had held good from the year 1900.

32. At the time of trial, it would have cost plaintiff $418,671.00 to purchase a single annuity, without death benefits, to yield him his average annual wage, commencing at age 38, for the duration of his life.

34. The present cash value of plaintiff's lost future earnings is $352,424.17."

In the Johnson case the findings were considerably more abbreviated, but obviously again reflected an adoption of the views expressed by Dr. Mayor:

"21. The present value of plaintiff's loss of earnings from February 1, 1971, through the year 1997, the year at which the plaintiff would be sixty-five years of age, is $274,716.18.

27. Plaintiff was thirty-three years of age on the date of the accident complained of and had a reasonable life expectancy of 36.69 years from such date, and a work life expectancy to the age 65."

With respect to both Starnes and Johnson the district court found that they had been rendered permanently physically unfit to perform their usual duties of employment or other forms of manual labor on a regular or continuous basis and that neither plaintiff was equipped for retraining into work not entailing manual labor.

In 1939 the Restatement of Torts declared that "[A] person whose interests of personality have been tortiously invaded is entitled to recover damages for past or prospective . . . (b) loss of earning capacity or earnings". Sec-

tion 924, page 631. Comment d to that Section, dealing with loss of future earnings, observed:

> "The extent of future harm to the earning capacity of the injured person is measured by the difference viewed as of the time of trial between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm. This difference is the resultant derived from reducing to present value the anticipated losses of earnings during the period of the prospective life the plaintiff would have had but for the defendant's act. Accordingly, the trier of facts must ascertain, as nearly as can be done in advance, the difference between the yearly earnings which the plaintiff probably would or could have received during his life expectancy but for the harm and the earnings which he will probably be able to receive during the period of his life expectancy as now determined. In this are considered the type of work which the plaintiff has done, the type of work which, in view of his physical condition, education, experience and age, he would have been doing and will be likely to do in the future during the working period of his life, together with all other matters reasonably relevant. A result is erroneous, however, which widely differs from that which might reasonably be reached upon the admissible data.
>
> In ascertaining the present worth of the future loss of earnings, that is, in discounting the recovery because future losses are paid for in advance, the rate of discount is based upon the current return upon long-term investments if the prospective losses are long continued." Pages 634-635.

The impact of inflationary trends in the American economy upon the calculation of future lost earnings

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was perceptively discussed by Professors Harper and James in their treatise "The Law of Torts":

> "Greater confusion surrounds present damages for future loss. Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. If the estimates represent a straight-line projection of present living costs, they will be frustrated by fluctuations either way. If prophecy of change is heeded, frustration will follow if no change, or the opposite change, occurs. When courts have consciously grappled with the problem they have either found all prophecy too speculative and so, perforce, have taken the equally speculative course of betting on a continuance of the status quo; or they have made intuitive and not always very wise judgments that present conditions represent a departure from some imaginary norm to which they think we shall rapidly return. It is not at all clear that courts would be willing to hear experts on the matter or that they would get much real help if they did. For the most part the problem—which is inevitably present in every case of future loss—is not analyzed and the present value of money is assumed to be the proper basis.
>
> The problem is necessarily insoluble under the principle of the single lump sum recovery. It could be approached with intelligent flexibility under a system of periodic payments continuing for the duration of future needs, though such a system would post other problems including a greater administrative burden on courts and defendants." Volume II, "The Law of Torts", § 25.11, pages 1325-1326.

The United States Supreme Court addressed itself to the problem of reducing to present value lost future

earnings under the Federal Employers Liability Act, which is incorporated by reference into the Jones Act, in Chesapeake & Ohio Railway v. Kelly, 1916, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117. That case was an action brought in the Kentucky state courts under the provisions of the FELA. The trial court entered judgment for the plaintiff based upon jury verdict and the Court of Appeals of Kentucky affirmed. In so affirming the appellate court approved the trial judge's refusal to instruct the jury to discount the lost future earnings figure (the refusal being based upon the theory that such a computation was too difficult for the jury). The United States Supreme Court reversed, holding that the present cash value of future earnings is the proper measure of recovery in actions brought under the Act. With regard to the selection of the proper reduction factor, the Supreme Court noted:

> "Local conditions are not to be disregarded, and besides, there may be cases where the anticipated pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.
>
> "We do not mean to say that the discount should be at what is commonly called the 'legal rate' of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least, without the exercise of financial experience

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> and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return." 241 U.S. at 490-491, 36 S.Ct. at 632, 60 L.Ed. at 1122.

McWeeney v. New York, New Haven, and Hartfold Railroad Company, 2 Cir. 1960, 282 F.2d 34, cert. denied 1960, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93, was an action under the Federal Employers Liability Act. The Second Circuit, sitting en banc, held that the district court had not erred in refusing a jury instruction proffered by the defendant railroad to the effect that the jury, in calculating future loss of earnings, should consider only the plaintiff's net income after the deduction of income taxes. The Court commented upon the impact of inflation in the following manner:

> "Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, § 25.11 (1956). Yet there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity, and it is scarcely to be expected that

> the average personal injury plaintiff will have the acumen to find investments that are proof against both inflation and depression—a task formidable for the most expert investor. The effect of inflation of 1% a year over McWeeney's 29—year expectancy at trial would go a long way toward offsetting any excess in the verdict due to failure to deduct income tax." 282 F.2d at 38.

The Sixth Circuit, in Sleeman v. Chesapeake & Ohio Railway Company, 6 Cir. 1969, 414 F.2d 305, encountered a situation where the district court, sitting without a jury in an action brought under the Federal Employers Liability Act, computed the plaintiff's future lost earnings but refused to reduce them to present value because he believed that inflationary trends would offset any reduction to present net worth. Citing the Supreme Court's decision in *Kelly,* supra, the court of appeals reversed the trial court's award of damages. The appeals court observed:

> "Nor do we encourage the trial courts of our circuit to explore such speculative influence on future damages as inflation and deflation.
>
> Of course, the nation's economic history since the 1930's would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor bearing on the future is attempted, the door is opened to similarly speculative and debatable

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offsets tending in other directions. See McWeeney v. New York, N. H. & H. R.R., 282 F.2d 34 (2d Cir. 1960)." 414 F.2d at 308.

We take judicial notice of the prophetic quality of the Sixth Circuit's disapproval of judicial inquiries into projected inflationary trends in our economy by noting the President's issuance of Executive Order No. 11615, August 17, 1971, 36 F.R. 15727, exercising his powers under the Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 799, to impose controls over prices, rents, wages and salaries.

[5] Although we today reverse the judgments entered below on the jury trial question discussed *supra*, we expressly disapprove the district court's attempt to take into account, in computing the plaintiff's future lost earnings, inflationary trends in this nation's economy for the next several decades. As the Sixth Circuit concluded in its *Sleeman* decision, we hold that the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination. Should either or both of these cases be retried before a jury, the triers of the facts should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings, nor should the jury be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index.

In the event of a retrial or retrials before juries, jury instructions concerning the discount rates to be applied should conform with the Supreme Court's comments in Kelly, supra, and today's decision by us in Blue v. Western Railway of Alabama, 5 Cir. 1972, 469 F.2d 487.

JOHN R. BROWN, Chief Judge (dissenting):

I respectfully dissent to the Court's decision on issues I (jury trial),[1] II (inflation),[2] and III (income tax)[3] and reserve the right to file a dissenting opinion on one or more or all of those issues.

GEE, Circuit Judge (dissenting):

I respectfully dissent from the ruling of the court en banc insofar only as it may indicate (1) that the juries which will try these cases on remand should not be advised that the lump-sum awards which they will be called on to calculate as replacements and compensation for lost future earnings will be exempt from income tax and (2) that they are to use gross earnings as their net earnings figures. I do so because, in my view, these holdings mandate largesse and not justice.

That such awards are not taxable is a relatively occult piece of information which jurors are unlikely to know, whereas the certainty of death and taxes weighs upon the serious economic reflections (if no others) of every thinking citizen and will go[1] with the jurors into the jury room when they retire. Their assumption in their deliberations can therefore only be that upon the amount which they award, as upon whatever else might be substituted for a

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1. With whom Gewin and Thornberry, Circuit Judges, join.

2. With whom Goldberg and Godbold, Circuit Judges, join.

3. With whom Ainsworth and Gee, Circuit Judges, join.

1. Together with the jurors' knowledge, common to mankind and as to which they require no special instruction, that we are in a period of long-term inflation and that lawyers must be paid.

taxable item, the hand of the collector will fall. Also under our decision, unless I have misunderstood it, the jurors are to consider pre-tax earnings figures to arrive at this nontaxable award. Thus we open to them the gates of fairyland and direct them to arrive at a take-home earnings figure[2]—and a lump sum to replace it—which never was and never would have been. This, I submit with deference, is not logic and should not be law.

Without belaboring the matter, it is well known that taxes on earned income may and do reach the fifty percent ceiling. One need only instance the case of, say, an able trial lawyer, an entertainer or a neurosurgeon earning $250,000 per year, having a twenty- or thirty-year work-life expectancy, killed under culpable circumstances, to grasp immediately that we here approve a blueprint for awards which may be clearly unjust by hundreds of thousands, perhaps even millions, of dollars.[3] And so juries, retiring under the full force of natural sympathy and of counsel's closing pleas to do full justice by the bereft on their only day in court, will produce verdicts incorporat-

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2. Based on gross earnings.

3. It is true the majority opinion attempts to avoid the high-tax-rate decedent problem illustrated by hinting that different rules might apply to his case. This notion, however, raises more problems than it dispels. The suggestion seems to recognize that what we do here will necessarily produce awards in some measure unjust to the defendant, who is made to pay decedent's beneficiaries an incremental amount which the government—rather than he—would have received had he lived. Doubtless a small- or middle-sized injustice is more tolerable than a large one, but I am disturbed to see us deliberately require the production of either sort. Put another way, since the suggestion all but admits that we here mandate gratuities, by what warrant do we extend our largesse to one set of beneficiaries and not to another? And at what point are our trial courts to draw the line?

ing generous windfall factors.[4] It is to the countenancing of these, and not to an adequate—even a generous—compensation for real losses, that I voice my dissent. One of the pointed lessons of recent times has been that the supply of golden eggs is not unlimited: just so surely as we require that one person receive more than just compensation—what he would have gotten but for the defendant's fault—somewhere another will receive less.

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4. As noted, this is especially so since the jury is misled as to tax effects not once, but twice: first in being offered gross earnings to use in computing take-home pay, and second in receiving no hint that their award is nontaxable. Use of net earnings would be the more desirable reform since these, like other factors involved in projecting a work-life's value into the future, are at least accurate past facts. But the nontaxable character of the award should also be made known, lest the jury feel tempted or obliged to superadd a factor for taxes which the survivors will never in fact have to pay.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 71-2243
SAM H. JOHNSON, Plaintiff-Appellee,
v.
PENROD DRILLING COMPANY,
Defendant-Appellant.

NO. 71- 2245

JAMES L. STARNES, Plaintiff-Appellee,
v.
PENROD DRILLING COMPANY,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Texas

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion Nov. 21, 1972, 5 Cir., 1972, ___F.2d___)

(March 29, 1973)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM: Upon considerations of the petitions for rehearing it is ORDERED that the portion of our November 21, 1972 opinion, 469 F.2d 897, following the title "PROCEEDINGS FOLLOWING REMAND" (page 903, 469 F.2d) and ending immediately preceding the caption "CONCLUSION" (page 907) is withdrawn. In lieu thereof the following language is substituted:

> Our conclusion that the district court in each case deprived Penrod of its Seventh Amendment right to a trial by jury requires reversal of the judgments entered below with directions that new trials be held before juries unless Penrod consents under Rule 39 (a) to non-jury proceedings. In the interest of husbanding judicial time we direct that in the event of retrials of these cases before juries, jury instructions concerning the discount rates to be applied to amounts allowed as damages for loss of future earnings should conform with the decision of the Supreme Court of the United States in *Chesapeake & Ohio Railway v. Kelly*, 1916, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117, and our decision in *Blue v. Western Railway of Alabama*, 5 Cir. 1972, 469 F.2d 487, certiorari denied, February 26, 1973, ____U.S.____, (41 U.S. Law Week 3462). With regard to the selection of the proper reduction factor for computing the present cash value of future earnings the Supreme Court in *Kelly*, 241 U.S. at 490-491, 36 S.Ct. at 632, 60 L.Ed. at 1122, stated:
>
> > "Local conditions are not to be disregarded, and besides, there may be cases where the anticipated pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all

> cases where it is reasonable to support that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.
>
> "We do not mean to say that the discount should be at what is commonly called the 'legal rate' of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least, without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return."

In the event that either or both of these cases are retried before the court in non-jury proceedings upon a consent thereto by Penrod under Rule 39(a), F.R.Civ.P. *Kelly* and *Blue* should be the district court's guides in computing the present value of future lost earnings.

In all other respects our opinion of November 21, 1972 is adhered to.

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2243

SAM H. JOHNSON,
Plaintiff-Appellee,

versus

PENROD DRILLING COMPANY,
Defendant-Appellant.

No. 71-2245

JAMES L. STARNES,
Plaintiff-Appellee,

versus

PENROD DRILLING COMPANY,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Texas

(November 21, 1972)

BLEED THROUGH

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: These two actions[1] for personal injuries under the Jones Act, Title 46, United States Code, Section 688, are making their second appearances in this Court. In a 1969 interlocutory appeal, we held that, under the special venue provisions of the Jones Act, plaintiffs Johnson and Starnes could maintain their suits against the shipowner-employer, Penrod Drilling Company (a partnership which conducts a multistate operation, hereinafter Penrod) in the Eastern District of Texas, a district in which the partnership did business although the partnership's principal office was not located in that district and no partner resided in that district. *Penrod Drilling Company v. Johnson and Starnes,* 5 Cir. 1969, 414 F.2d 1217, cert. denied 1970, 396 U.S. 1003, 90 S. Ct. 552, 24 L.Ed.2d 495. Today we hold that the district court in each action deprived Penrod of its Seventh Amendment right to trial by jury when it afforded retrospective application to the plaintiffs-appellees' amendments to their complaints stating claims within the district court's admiralty and maritime jurisdiction. This necessitates reversal of the judgments entered below and remands for further proceedings.

APPEAL NO. 71-2243, PENROD v. JOHNSON

On January 12, 1965, while employed as a member of the crew of an amphibious drilling rig barge owned and

1. The actions were separate, were separately tried below by the same district judge, and come to us by separate appeals, although orally argued on the same date. Because of identity of issues involved we find it appropriate to dispose of them by a single opinion.

operated on internal navigable waters of Louisiana by defendant Penrod, plaintiff-appellee Sam H. Johnson (Johnson) sustained personal injuries in an accident aboard the vessel. Johnson brought suit below against Penrod for damages on August 30, 1966, alleging both diversity of citizenship and Jones Act jurisdiction, and an amount in controversy in excess of $10,000.00. The complaint alleged negligence of the defendant and that the vessel was unseaworthy. A separate demand for trial by jury was filed by Johnson with the complaint. The complaint was timely answered by Penrod and there matters stood for more than three years, without further pleadings.

Following our affirmance as to venue, supra, Johnson filed an amended complaint on February 23, 1970, paragraph I of which alleged: "This cause is brought under the Admiralty and Maritime jurisdiction of this Court pursuant to the provisions of Rule 9(h) of the Federal Rules of Civil Procedure". The amended complaint did not seek to withdraw the demand for jury trial. It was not mentioned.

The district court, on February 23, 1970, issued an omnibus order at a preliminary pre-trial conference. Paragraph 8 directed: "That at the final pre-trial conference, the attorneys for the parties submit: . . . (b) separately prepared proposed findings of fact and conclusions of law".

On September 2, 1970, Penrod moved for a jury trial pursuant to Rule 38(d), F.R.Civ.P. The motion asserted Johnson's original demand for jury trial, that Penrod had not consented to withdrawal of the demand, and that the jury trial demand was made prior to the amendment of the complaint to state a claim under Rule 9(h) of the Rules.

Both Johnson and Penrod, on September 3, 1970, as directed by the court's February 23 order, submitted proposed findings of fact and conclusions of law to the district court. The case went to trial without a jury on September 17, 1970. The following day Johnson filed with leave of court another amended complaint together with additional proposed findings of fact and conclusions of law seeking increased damages. On September 25, 1970, after the non-jury trial ended September 18, both parties submitted supplemental proposed findings of fact and conclusions of law and on September 29, 1970, Johnson filed still another amended complaint alleging a Jones Act cause of action and citing Rule 9(h).

The district judge rendered his findings of fact and conclusions of law on February 17, 1971, finding for Johnson as to liability. He deducted 20% of the assessed damages based upon the plaintiff's contributory negligence. Judgment was entered on March 22, 1971, for Johnson and against Penrod in the amount of $307,890.26, together with interest at the rate of 6% per year from the date of judgment. Penrod moved for a new trial, which motion was denied on May 3, 1971. Notice of this appeal timely followed.

APPEAL NO. 71-2245, PENROD v. STARNES

Plaintiff-appellee James L. Starnes (Starnes) was employed as a member of the crew of the W. O. Woodward, a Penrod owner and operated offshore drilling barge located fifty miles offshore in the Gulf of Mexico. On May 3, 1966 he sustained personal injuries in an accident aboard the vessel. Starnes brought suit against Penrod in the lower court on December 1, 1966, alleging both diversity of citizenship and Jones Act jurisdiction, and an

amount in controversy in excess of $10,000.00. The date suit was filed Starnes also filed and served separately his demand for trial by jury. This case was jointly appealed with *Johnson* on the venue question, *Penrod Drilling Company v. Johnson and Starnes,* supra, with of course the same result.

The district court shortly after receiving our mandate in the prior appeal, held a preliminary pre-trial conference on February 23, 1970 and thereupon issued an order, paragraph 8 of which directed: "That at the pre-trial conference, the attorneys for the parties submit: . . . (b) separately prepared proposed findings of fact and conclusions of law".

Starnes filed an amended complaint on March 27, 1970. This complaint did not mention a demand for jury trial and did not cite the Jones Act. Paragraph I of the amended complaint alleged: "This cause is brought under the Admiralty and Maritime jurisdiction of this Court pursuant to the provisions of Rule 9(h) of the Federal Rules of Civil Procedure". On August 10, 1970, Starnes filed a second amended complaint again alleging a claim under Rule 9(h) and referring to the Jones Act as a basis for recovery. Again the matter of jury trial was not mentioned in the complaint.

On September 3, 1970, in compliance with the trial court's February 23 order, Starnes submitted his proposed findings of fact and conclusions of law. On September 11, 1970, Penrod submitted its proposed findings and conclusions.

Precisely as it did in *Johnson, Penrod* moved for jury trial on all issues. The motion recited the pleadings previously filed by Starnes and went on to assert: "The de-

fendant states that the plaintiff should not be allowed to withdraw its demand for a jury trial by an amendment of the pleadings in the manner in which the complaint has been filed, and that the defendant is entitled to a jury trial on all issues of this case".

The case went to trial without a jury on September 18, 1970, the trial being concluded on September 22, 1970. The district court rendered its findings of fact and conclusions of law in favor of Starnes on February 22, 1971, with no reductions in the award of damages on account of Starnes' contributory negligence. On March 9, 1971, Penrod moved for a jury trial on all issues and that same day the district court overruled the motion nunc pro tunc, reciting that a motion by Penrod for jury trial on all issues had been heard and considered by the court on September 11, 1970. Judgment was entered in favor of Starnes and against Penrod on March 9, 1971, in the amount of $469,457.43, together with interest at 6% per annum from the date of judgment. Penrod's motion for a new trial was heard and overruled on May 10, 1971, and notice of this appeal followed on May 28, 1971.

THE JURY TRIAL ISSUE

Our resolution of the jury trial issue presented by these appeals requires that we attempt a reconciliation of apparently conflicting provisions of the Federal Rules of Civil Procedure. In this connection, we have found no appellate decisions dealing with the precise question raised here.

The Seventh Amendment to the United States Constitution states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 38 of the Federal Rules of Civil Procedure in pertinent part provides:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.
>
> (e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."

Rule 39(a) controls when demand for jury trial occurs:

> "(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a

> jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Subdivision (h) was added to Rule 9 of the Federal Rules of Civil Procedure with the 1966 unification of civil and admiralty procedures, effective July 1, 1966. We quote Rule 9(h) as it emerged after amendments effective July 1, 1968 and July 1, 1970:

> "Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)."

The relation back of amendments to pleadings is dealt with in Rule 15(c):

> "Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . ."

As we have noted earlier in this opinion, prior to the amendments filed below alleging admiralty and maritime claims under Rule 9(h), each of the complaints involved on this appeal asserted jurisdiction both by reason of the Jones Act and on diversity of citizenship grounds. In addition, and of critical importance, prior to the Rule 9(h) amendments, each plaintiff had demanded trial by jury. The addition of the Rule 9(h) statement in each case could only have been designed to achieve one result the withdrawal of the plaintiffs' demands for jury trials. The issue on these appeals, restated in technical terms, becomes therefore: Could the plaintiffs, through the device of amending their complaints to state admiralty and maritime claims under Rule 9(h), effectively withdraw their demands for jury trials without compliance with the specific procedures set forth in Rule 39(a) for the withdrawal of such demands?

Starnes and Johnson argue that such withdrawals are permissibly accomplished without compliance with Rule 39(a) and they refer us to the Notes of the Advisory Committee on Rules for the 1966 Amendment. In discussing the impact of the new Rule 9(h), the Advisory Committee observed that one of the significant differences between a civil action and an admiralty action is the right to trial by jury in the former action and the absence of such a right in the latter. It then stated:

> "Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple

statement in his pleading to the effect that the claim is an admiralty or maritime claim.

"The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15."

Penrod, on the other hand, contends that the plaintiffs could not effectively withdraw their demands for jury trials in the absence of compliance with Rule 39(a) and that it is clear that no such compliance has taken place in these cases.

Penrod relies heavily upon *Banks v. Hanover Steamship Corporation,* D.Md. 1967, 43 F.R.D. 374. *Banks* reports with respect to three separate actions brought by three longshoremen against shipowners for negligence and unseaworthiness. In each case the shipowner filed a third-party complaint for indemnity against the employer-stevedoring company. Each of the third-party defendants (stevedoring companies) sought trial by jury as to all or some of the issues, but the longshoremen and the shipowners preferred nonjury trials. Of the three actions reported under *Banks* the case procedurally most similar to the cases now at bar was *Korzun v. N.Y. Stoom v. Maats Nederland v. Jarka Corp.,* Civil No. 16800. In *Korzun,* the plaintiff-longshoreman filed suit prior to July 1, 1966, the effective date of the unification of the civil and admiralty dockets. The complaint asserted a civil action based upon diversity of citizenship. Neither the plaintiff nor the shipowner demanded a jury trial, but the stevedore third-party defendant filed with its answer a demand

for jury trial on all issues. Consequently, as the district court noted, the longshoreman sought leave to amend his complaint:

> "In a further effort to avoid a jury trial on the issues raised by the original complaint and answer, plaintiff seeks leave under Rule 15 to amend its complaint to strike the paragraph alleging diversity jurisdiction and to add a statement pursuant to Rule 9 (h), identifying the claim as an admiralty and maritime claim. Rule 15 permits the requested amendment at this time 'only by leave of court or by written consent of the adverse party', but 'leave shall be freely given when justice so requires.' . . . The proposed amendment is opposed both by defendant and by third-party defendant.
>
> "A request to amend a complaint by adding such an identifying statement is subject to the provisions of Rules 15, 38 and 39 . . . The Court's discretion under Rule 15 should be governed by the principles stated in Rules 38 and 39 and the cases applying those principles. . . .
>
> "The Court concludes that leave to file the proposed amendment should not be granted, because its only purpose is to deprive the third-party defendant of the jury trial which third-party defendant has demanded." (citations and footnotes omitted). 43 F. R.D. at 380.

Although *Banks* is clearly distinguishable both factually and procedurally from the two matters now before us, we believe that the Maryland district court opinion properly reconciled the provisions of Rule 9(h) with those of Rules 38 and 39, with due regard to the constitutional aspects of the pleading problem presented to it. Rule 38 unhesitatingly affirms that the Seventh Amendment's guar-

antee of the right to trial by jury in federal civil cases "shall be preserved to the parties inviolate". Rule 38(a), supra. The procedure set forth in Rule 39(a) for transferring an action from a district court's jury docket to its non-jury docket gives explicit recognition to the quasi-constitutional privilege of the party who did not originally demand trial by jury to rely upon the jury trial demand made by the adverse party. We therefore hold that the district court erred when it transferred these two actions from its jury docket to its non-jury docket without first obtaining Penrod's Rule 39(a) consent to the transfers because the two transfers constituted violations of Penrod's Seventh Amendment right to trial by jury.

Johnson and Starnes press a fall-back argument upon us in support of the district court's transfer actions. They claim that Penrod tacitly consented to the transfers to the non-jury docket by submitting proposed findings of fact and conclusions of law to the district court before and after the non-jury trials. Penrod responds by pointing out that it had been directed by the district court to submit the proposed findings and conclusions and that it filed demands for jury trial before trial in each case.

We find no substance in this position asserted by the appellees. Penrod was left no option but to submit the proposed findings and conclusions as the trial judge directed. It had unequivocally made clear its desire for trial by jury in each case in advance of trial. Penrod did not in our view in either case take any position which may be construed as tacit consent to proceed without a jury. It did nothing to constitute a waiver of its right to jury trial.

PROCEEDINGS FOLLOWING REMAND

Our conclusion that the district court in each case deprived Penrod of its Seventh Amendment right to a trial by jury requires reversal of the judgments entered below with directions that new trials be held before juries unless Penrod consents under Rule39(a) to non-jury proceedings. We think appropriate regard for husbanding judicial time requires comment upon the manner in which the issue of damages was litigated and decided below, and directions as to procedure after remand.

Dr. Thomas Mayor, an economist, testified for Starnes and Johnson in each trial for the purpose of projecting the plaintiff's future earnings and prevailing interest rates. He stated that, in his opinion, the wages of the plaintiffs would probably increase at an annual rate of 4.8% for the remainder of their projected work-lives. In addition, he recommended that the present values of these projected future earnings be computed through the application of a 4% reduction factor. Dr. Mayor selected a 4% factor because an insurance company, if asked to sell to the plaintiffs single payment annuity contracts written to return the average projected earnings of the plaintiff over their anticipated work-lives, would assume a 4% return on investment.

Dr. Burke A. Parsons, also an economist, testified for Penrod in the Starnes trial for the purpose of rebutting Dr. Mayor's testimony. Dr. Parsons expressed the view that it was impossible to project with accuracy inflationary trends in the economy and in the petroleum industry over the periods representing the remainders of the plaintiffs' projected work-lives. He stated that the 4.8% wage increase figure projected by Dr. Mayor was too high. With

regard to an appropriate rate to be employed for reducing the future earnings award to present value, Dr. Parsons testified that the then prevailing interest rates of between seven and eight percent per year on blue-chip corporate bonds would provide an acceptable range of reduction factors.

The district court made the following findings of fact as to the estimated future earnings of Starnes:

> "30. Plaintiff was 32 years of age on the day of the accident complained of. He was 37 years old at the time of the trial and had a life expectancy of 34.4 years. In all reasonable probability, plaintiff would have continued to work until age 65.
>
> 31. The wages of one performing the type of work that plaintiff was performing at the time of the accident in issue is likely to increase at the annual rate of 4.8% per annum. This percentage of annual increases in wages was the rate of increase of such wages from 1946 to 1969; and was the rate of annual increases which had held good from the year 1900.
>
> 32. At the time of the trial, it would have cost plaintiff $418,671.00 to purchase a single annuity, without death benefits, to yield him his average annual wage, commencing at age 38, for the duration of his life.
>
> 34. The present cash value of plaintiff's lost future earnings is $352,424.17."

In the Johnson case the findings were considerably more abbreviated, but obviously again reflected an adoption of the views expressed by Dr. Mayor:

> "21. The present value of plaintiff's loss of earnings from February 1, 1971, through the year 1997,

the year at which the plaintiff would be sixty-five years of age, is $274,716.18.

27. Plaintiff was thirty-three years of age on the date of the accident complained of and had a reasonable life expectancy of 36.69 years from such date, and a work life expectancy to the age 65."

With respect to both Starnes and Johnson the district court found that they had been rendered permanently physically unfit to perform their usual duties of employment or other forms of manual labor on a regular or continuous basis and that neither plaintiff was equipped for retraining into work not entailing manual labor.

In 1939 the Restatement of Torts declared that "[A] person whose interests of personality have been toriously invaded is entitled to recover damages for past or prospective . . . (b) loss of earning capacity or earnings". Section 924, page 631. Comment d to that Section, dealing with loss of future earnings, observed:

"The extent of future harm to the earning capacity of the injured person is measured by the difference viewed as of the time of trial between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm. This difference is the resultant derived from reducing to present value the anticipated losses of earnings during the period of the prospective life the plaintiff would have had but for the defendant's act. Accordingly, the trier of facts must ascertain, as nearly as can be done in advance, the difference between the yearly earnings which the plaintiff probably would or could have received during his life expectancy but for the harm and the earnings which he will probably be able to receive during the period of his life expectancy as

now determined. In this are considered the type of work which the plaintiff has done, the type of work which, in view of his physical condition, education, experience and age, he would have been doing and will be likely to do in the future during the working period of his life, together with all other matters reasonably relevant. A result is erroneous, however, which widely differs from that which might reasonably be reached upon the admissible data.

In ascertaining the present worth of the future loss of earnings, that is, in discounting the recovery because future losses are paid for in advance, the rate of discount is based upon the current return upon long-term investments if the prospective losses are long continued." Pages 634-635.

The impact of inflationary trends in the American economy upon the calculation of future lost earnings was perceptively discussed by Professors Harper and James in their treatise "The Law of Torts":

"Greater confusion surrounds present damages for future loss. Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. If the estimates represent a straight-line projection of present living costs, they will be frustrated by fluctuations either way. If prophecy of change is heeded, frustration will follow if no change, or the opposite change, occurs. When courts have consciously grappled with the problem they have either found all prophecy too speculative and so, perforce, have taken the equally speculative course of betting on a continuance of the status quo; or they have made intuitive and not always very wise judgments that present conditions represent a departure from some imaginary norm to which they think we shall rapidly return. It is not at

all clear that courts would be willing to hear experts on the matter, or that they would get much real help if they did. For the most part the problem —which is inevitably present in every case of future loss—is not analyzed and the present value of money is assumed to be the proper basis.

The problem is necessarily insoluble under the principle of the single lump sum recovery. It could be approached with intelligent flexibility under a system of periodic payments continuing for the duration of future needs, though such a system would post other problems including a greater administrative burden on courts and defendants." Volume II, "The Law of Torts", §25.11, pages 1325-1326.

The United States Supreme Court addressed itself to the problem of reducing to present value lost future earnings under the Federal Employers Liability Act, which is incorporated by reference into the Jones Act, in *Chesapeake & Ohio Railway v. Kelly,* 1916, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117. That case was an action brought in the Kentucky state courts under the provisions of the FELA. The trial court entered judgment for the plaintiff based upon jury verdict and the Court of Appeals of Kentucky affirmed. In so affirming the appellate court approved the trial judge's refusal to instruct the jury to discount the lost future earnings figure (the refusal being based upon the theory that such a computation was too difficult for the jury). The United States Supreme Court reversed, holding that the present cash value of future earnings is the proper measure of recovery in actions brought under the Act. With regard to the selection of the proper reduction factor, the Supreme Court noted:

"Local conditions are not to be disregarded, and besides, there may be cases where the anticipated

pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

"We do not mean to say that the discount should be at what is commonly called the 'legal rate' of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least, without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return." 241 U.S. at 490-491, 36 S.Ct. at 632, 60 L.Ed. at 1122.

McWeeney v. New York, New Haven, and Hartford Railroad Company, 2 Cir. 1960, 282 F.2d 34, cert. denied 1960, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93, was an action under the Federal Employers Liability Act. The Second Circuit, sitting en banc, held that the district court had not erred in refusing a jury instruction proffered by the defendant railroad to the effect that the jury, in calculating future loss of earnings, should consider only the

plaintiff's net income after the deduction of income taxes. The Court commented upon the impact of inflation in the following manner:

> "Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, § 25.11 (1956). Yet there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity, and it is scarcely to be expected that the everage personal injury plaintiff will have the acumen to find investments that are proof against both inflation and depression—a task formidable for the most expert investor. The effect of inflation of 1% a year over McWeeney's 29-year expectancy at trial would go a long way toward offsetting any excess in the verdict due to failure to deduct income tax." 282 F.2d at 38.

The Sixth Circuit, in *Sleeman v. Chesapeake & Ohio Railway Company,* 6 Cir. 1969, 414 F.2d 305, encountered a situation where the district court, sitting without a jury in an action brought under the Federal Employers Liability Act, computed the plaintiff's future lost earnings but refused to reduce them to present value because he believed that inflationary trends would offset any reduction to present net worth. Citing the Supreme Court's decision in *Kelly,* supra, the court of appeals reversed the trial court's award of damages. The appeals court observed:

> "Nor do we encourage the trial courts of our circuit to explore such speculative influence on future damages as inflation and deflation.

> Of course, the nation's economic history since the 1930's would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor bearing on the future is attempted, the door is opened to similarly speculative and debatable offsets tending in other directions. See McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir. 1960)." 414 F.2d at 308.

We take judicial notice of the prophetic quality of the Sixth Circuit's disapproval of judicial inquiries into projected inflationary trends in our economy by noting the President's issuance of Executive Order No. 11615, August 17, 1971, 36 F.R. 15727, exercising his powers under the Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 799, to impose controls over prices, rents, wages and salaries.

Although we today reverse the judgments entered below on the jury trial question discussed *supra*, we expressly disapprove the district court's attempt to take into account, in computing the plaintiffs' future lost earnings, inflationary trends in this nation's economy for the next several decades. As the Sixth Circuit concluded in its *Sleeman* decision, we hold that the influence on future damages or possible inflation or deflation is too speculative a matter for judicial determination. Should either or both of these cases be retried before a jury, the triers of the facts

should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings, nor should the jury be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index.

In the event of a retrial or retrials before juries, jury instructions concerning the discount rates to be applied should conform with the Supreme Court's comments in Kelly, supra, and today's decision by us in *Blue v. Western Railway of Alabama,* 5 Cir. 1972, ____F.2d____ [No. 71-2289, decided _____, 1972].

CONCLUSION

The judgments of the district court in both No. 71-2243 and No. 71-2245 are REVERSED and the causes are REMANDED for further proceedings consistent with this opinion.

APPENDIX D

Notice of Advisory Committee on Rules

1966 Amendment

"Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

"It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or

as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, possessory, petitory and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

"The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not be required to forego mention of all available jurisdictional grounds.

BLEED THROUGH

"Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

"The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1616

SAM H. JOHNSON,

Petitioner,

versus

PENROD DRILLING COMPANY,

Respondent,

No. 74-1617

JAMES L. STARNES,

Petitioner,

versus

PENROD DRILLING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1616

SAM H. JOHNSON,
Petitioner,

versus

PENROD DRILLING COMPANY,
Respondent.

No. 74-1617

JAMES L. STARNES,
Petitioner,

versus

PENROD DRILLING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

THROUGH

MAY IT PLEASE THE COURT:

The decision by the United States Court of Appeals for the Fifth Circuit sitting *en banc* rendered on March 21, 1975, does not warrant review by this Court.

Petitioners have filed separate petitions for a writ of certiorari. Due to the common questions raised, Respondent proffers a singular reply.

OPINIONS BELOW

The complete original panel opinion is unreported since it was amended on petition for rehearing on March 29, 1973, reported at 469 F.2d 897 (5th Cir. 1973). The reported panel opinion is at 469 F.2d 897 (1972). The *en banc* opinion of the Fifth Circuit is reported at 510 F.2d 234 (5th Cir. 1975). All opinions appear in the appendices to the Petitions.

REASONS WRIT SHOULD BE DENIED

1. The Fifth Circuit's *En Banc* Decision was Correct in Holding that Respondent is Entitled to a Trial by Jury. The Fifth Circuit has not Held that there is a Right to Jury Trial in Admiralty and Maritime Claims within the Meaning of 9 (h). The Decision is Supported by the Jurisprudence and there is no Conflict Among the Circuits or with any Decision of this Court.

2. The Fifth Circuit's *En Banc* Decision Excluding Evidence of the Influence on Damages of Future Possible Inflation or Deflation and Requiring Reduction to Present Value is Correct. It does not Conflict with the

Decision of any other United States Court of Appeal or any Decision of this Court; it Adheres to Established Principles.

STATUTORY PROVISIONS

Petitioners' second question is whether or not Petitioners through the device of amending their Complaint to state admiralty and maritime claims under Rule 9 (h) can effectively withdraw their demands for jury trials without compliance with the procedures set forth in Rule 39 (a) for the withdrawal of such demands and thereby deprive Respondent of its Seventh Amendment right to a jury trial.

The Fifth Circuit's decision upholding the right to trial by jury involves provisions of the Federal Rules of Civil Procedure, 28 U.S.C.A., and the Seventh Amendment, United States Constitution. These authorities are set forth in the panel opinion, 469 F.2d 897, 901-902 (5th Cir. 1972), as adopted by the Fifth Circuit *en banc*, 510 F.2d 234, 235 (5th Cir. 1975).

A pertinent provision of Rule 38, paragraph (d), was not included in the opinion. It provides:

> "Rule 38. Jury Trial of Right.
>
> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

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STATEMENT OF THE CASE

Petitioners filed civil actions in the United States District Court for the Eastern District of Texas seeking damages for alleged personal injuries. They alleged diversity of citizenship, jurisdictional amount, Jones Act jurisdiction at law, and claims for unseaworthiness and maintenance and cure. They filed written demands for a trial by jury; and each case was assigned for trial by jury.

Both cases remained set for jury trial for more than three years, when Petitioners filed Amended Complaints in which they re-averred earlier factual allegations and also stated their claims were admiralty and maritime in nature. The original Complaints were not withdrawn. The demands for jury trial were never withdrawn.

Preceding trial, the District Judge removed the cases from the jury docket, and advised Respondent that they would be tried to the Court. The Respondent had never consented at any time in either case to a waiver by Petitioners of their demand for trial by jury. Respondent filed motions for trial by jury in both cases, emphasizing its right to jury trial, and Rule 38 and Rule 39 of the Federal Rules of Civil Procedure. The motions were summarily overruled on the eve of trial. (Facts reported at 469 F.2d 897, 899-901.)

After successive trials, the District Court found liability. Petitioners offered no evidence to demonstrate any increases in their past annual individual earnings or to support increased earning potential. Based exclusively upon forecasted future national in-

flationary trends, without any relationship to Petitioners' earnings records, or their impact upon an award paid in current dollars, the Court held that both Petitioners' annual earnings would forever increase through age 65 at a constant rate. It awarded enormous damages for loss of wages.[1]

Respondent effected an appeal to the Fifth Circuit on multiple bases. The Fifth Circuit held that Respondent had been wrongfully deprived of a trial by jury and reversed,[2] holding that on remand evidence should not be considered of the possible influence of speculative future inflationary or deflationary monetary trends upon a judgment for future loss of wages.

On application for rehearing by Petitioners, the opinion was modified to delete evidentiary instructions. The modification was due to the concomitant decision of another panel of the Fifth Circuit in *Canal Barge Co., Inc. v. M. K. Griffith*, 480 F.2d 11 (5th Cir. 1973). Respondent's application for a rehearing *en banc* was granted to resolve an intracircuit conflict.

The Court of Appeals *en banc* upheld Respondent's right to a trial by jury; held that the effect of possible

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1 Johnson, age 33, in his original Complaint (R. 9) and last Amended Complaint filed after the trial (R. 98), alleged earnings of $6,084 per year. The Court found damages of $380,470.97 of which $325,370.97 was solely for loss of wages (R. 50). The judgment was reduced 20% for comparative negligence.

Starnes, age 32, alleged earnings of $550 per month or $6,600 per year (R. 8). In the judgment, loss of wages was awarded in the amount of $409,929.43 (R. 164).

2 Accordingly, other issues raised were not decided.

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future inflation was not to be included in a present rule for calculating future damages; held that the impact of income taxes was not to be considered; and required reduction to present value by use of an appropriate interest rate prevailing at the time and place of trial.

ARGUMENT

1. The Fifth Circuit's En Banc Decision was Correct in Holding that Respondent is Entitled to a Trial by Jury. The Fifth Circuit has not Held that there is a Right to Jury Trial in Admiralty and Maritime Claims within the Meaning of 9 (h). The Decision is Supported by the Jurisprudence and there is no Conflict Among the Circuits or with any Decision of this Court.

There is no dispute that Petitioners both filed civil actions at law in 1966 and requested a trial by jury. They alleged diversity jurisdiction[3] and they alleged Jones Act jurisdiction. These pleadings were never withdrawn by the Amended Complaints; however, if Petitioners intended to withdraw the jury demand in this manner, it is indisputable that they never obtained the consent of Respondent as required by Rule 38 (d) and Rule 39 (a).

The panel opinion of the Court of Appeals, adopted by the Court *en banc*, holds that in the context of these cases plaintiffs cannot unilaterally waive the demand

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3 Petitioner Johnson in his brief before the Court of Appeals *en banc* and now in this brief claims that there was really no diversity jurisdiction. This was never factually resolved. However, it is not central to the Fifth Circuit's decision.

for trial by jury and deprive defendants of a vested right under the Seventh Amendment. The decision is not a case of first impression and is in accord with decisions in other Circuits.

In its opinion, the Fifth Circuit Court discussed the decision of the District Court of Maryland in *Banks v. Hanover Steamship Corp.*, 43 F.R.D. 374 (D.C.M.D. 1967) in reconciling Federal Rules 9 (h), 15 (c) and Rules 38 and 39 (469 F.2d 897, 903). It did not misconstrue the *Banks* decision, particularly the action most similar to the case at bar, *Korzun v. N.Y. Stoom v. Maats Nederland v. Jarka Corp.* It recognized the cases were procedurally distinguishable but adopted the reasoning of the Maryland District Court. When a civil action is filed and a jury trial requested, by amendment of the complaint plaintiff cannot indirectly deprive a party of his right to trial by jury. The specific rules governing jury trials, Rule 38 and Rule 39, cannot be circumvented by the relation back provisions of Rule 15 (c), covering general amendments to pleadings.

Decisions in other Circuits agree. The Third Circuit in *Yates v. Dan*, 233 F.2d 64 (3rd Cir. 1955) held that following a demand for a jury trial under the Jones Act, plaintiff could not transfer the suit to admiralty and deprive defendant of a trial by jury. Under Rule 38 (d) and Rule 39 (a) he must secure the written consent or oral consent in open Court of the defendant. See, *Thomas v. Penninsula & Oriental Steamship Nav. Co.*, 246 F.Supp. 592 (E.D.Pa. 1965); *Famiano v. Enyeart*, 398 F.2d 661 (7th Cir. 1968); *McAndrews v. U.S. Lines*, 167 F.Supp. 41 (S.D.N.Y. 1958).

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The Fifth Circuit decision is not a constrained interpretation of the Federal Rules of Civil Procedure, 28 U.S.C.A. It is consistent with settled rules of construction. The specific rules, Rules 38 and 39, governing a right to a trial by jury should take precedence over the general rule, Rule 15 (c), governing the broad subject of changes in pleadings.[4]

The decision is not in direct or implied conflict with this Court's decision in *Fitzgerald v. United States Lines*, 374 U.S. 16, 83 S.Ct. 1646 (1963). *Fitzgerald* does not discuss the issue at bar. However, it does support the Fifth Circuit's decision. A seaman had sued a shipowner for Jones Act negligence, unseaworthiness and maintenance and cure. He demanded a jury trial. The District Judge determined that he would reserve the issue of maintenance to himself but submit the other issues to the jury. This Court reversed; it held that all issues should be tried to the jury, an honored institution in our jurisprudence:

> "While this Court has held that the 7th Amendment does not require a jury trial in Admiralty cases, neither the amendment nor any other provision of the Constitution forbids them, nor does any statute of Congress, or Rule of Procedure, Civil or Admiralty, forbid jury trial in Maritime cases . . ." (374 U.S. at p. 20)

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4 In *Pacific Gas & Electric Co. v. Fibreboard Products, Inc.*, 116 F.Supp. 377 (N.D.Cal. 1953), the Court resolved a conflict between Rule 15 (a) and Rule 21. The two rules must be resolved in favor of the specific (Rule 21) over the general (Rule 15[a]).

Petitioners reliance on the Advisory Committee Notes is misplaced (Petition. App. D. p. 64). What the Advisory Committee intended by paragraph (h) of Rule 9 was that where a plaintiff filed an action with separate jurisdictional bases, of which one was a traditional admiralty claim, he could add an identifying statement to reserve distinctly maritime remedies, such as attachment and garnishment or actions *in rem*, in accord with Rule 15. This does not mean that requirements of other specific Rules of Procedure affected can be ignored.

Contrary to Petitioners' thesis, the Committee stated:

> "Thus, at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the savings to suitors clause (28 U.S.C. 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the most important procedural consequences is that in the civil action *either party* may demand a jury trial, while in the suit in admiralty there is no right to trial by jury except as provided by statute." (Petitions, App. D) (Emphasis supplied)

In the authoritative *Moore's Federal Practice*,[5] which contains the Advisory Notes, the editor's clear

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5 5 *Moore's Federal Practice*, Sec. 38.12 (2), p. 128.25.

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statement is contrary to Petitioners' position and on all fours with the *en banc* opinion of the Fifth Circuit:

> "An Action by an injured seaman, or his personal representative, against his employer under the Merchant Marine Act, popularly known as the Jones Act, is an action at common law comparable to an action by an injured railway employee under the Federal Employers' Liability Act. *The Jones Act expressly provides for trial by jury. And since the action, if brought in a federal district court is subject to the Federal Rules, Rules 38 and 39 govern demand and waiver.*" (*Moore's, supra,* at p. 128.25-128.26)

The interpretation of the Rules is consistent with the ordinary administration of justice which requires that at some time the determination of whether a case shall be tried to a jury or without jury be reached and thereafter adhered to.

Complementing Bases Support The Fifth Circuit's Decision

It is evident on the facts that Petitioners are feigning their allegation that an unprecedented trial by jury has been created in admiralty. However, common law courts have always had jurisdiction of a cause of action in tort for damages when a shipowner could be reached personally. This concurrent right was not excluded by the admiralty grant in the Constitution. The common law jurisdiction is retained except for the power and authority of admiralty courts to declare uniform maritime law and to issue special admiralty procedures. 1 *Benedict On Admiralty*, A. W. Knauth

(7th Ed. Rev.) Chapter VIII, Sec. 121, p. 8-1. *Scoonmaker v. Gilmore*, 102 U.S. 118, 26 L.Ed. 95 (1890). A suit to enforce a legal right at common law carries with it the right to trial by jury under the Seventh Amendment. *Ross v. Bernard*, 396 U.S. 531, 534, 90 S.Ct. 733, 735 (1970).

Thus, this Court has held that diversity jurisdiction carries with it the right to a trial by jury as part of the remedy, and the provisions of the Seventh Amendment are brought into play[6]. The admiralty remedies for maintenance and cure and unseaworthiness are subject to diversity jurisdiction on the law side of the Court under the savings to suitors clause with the right of trial by jury. The same is true when there is pendent jurisdiction under the Jones Act.[7]

Separately, Petitioners filed at law claims under the Jones Act, 46 U.S.C.A., Section 688. The Jones Act adopts all jurisprudence developed under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq. This Court has held that the act provides a legal cause of action affording litigants the right to trial by jury under the Seventh Amendment as part and parcel of the remedy.[8]

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6 *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S.Ct. 780, 784, 7 L.Ed.2d 798 (1962), reh. denied at 369 U.S. 882, 82 S.Ct. 1137, 8 L.Ed.2d 284, motion denied 371 U.S. 803, 83 S.Ct. 15, 9 L.Ed.2d 51. Also, *Williams v. Tidewater Associated Oil Co.*, 227 F.2d 791 (9th Cir. 1955), cert. denied 350 U.S. 960, 76 S.Ct. 348.

7 *Fitzgerald v. United States Lines*, 374 U.S. 16, 83 S.Ct. 1646 (1963).

8 *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, supra, Note 6; *Schultz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 76 S.Ct. 608 (1956); *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 63 S.Ct. 1062 (1943); *Planters Manufacturing Co. v. Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir. 1967).

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In *Atlantic & Gulf Stevedores, Inc. v. Ellerman*,[9] this Court held:

> "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. *As in cases under the Jones Act * * * and under the Federal Employers' Liability Act * * * trial by jury is part of the remedy. Thus the provisions of the Seventh Amendment, noted above, are brought into play.* * * * As we recently stated in another diversity case, *it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'* " (369 U.S. at 360) (Emphasis supplied)

Petitioners' contention before this Court that the Fifth Circuit Court of Appeals has created a right to trial by jury in an exclusively admiralty claim is not correct. Its decision does not depart from prior jurisprudence and it conflicts with no decision of this Court or any Circuit Court.

2. **The Fifth Circuit's En Banc Decision Excluding Evidence of the Influence on Damages of Future Possible Inflation or Deflation and Requiring Reduction to Present Value is Correct. It does not Conflict with the Decision of any Other United States Court of Appeal or any Decision of this Court; it Adheres to Established Principles.**

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9 *Supra*, Note 6.

The decision of the Fifth Circuit *en banc* is supported by decisions in the other Circuits[10] and conflicts with none. This was emphasized in its opinion. (510 F.2d 234, 236).

Petitioners claim that the Fifth Circuit has circumscribed the dictates of this Court in *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). This contention is spurious. In *Kelly*, this Court held that the present cash value of future earnings is the proper measure of recovery in actions under the Federal Employers' Liability Act. The Fifth Circuit specifically considered and adhered to the *Kelly* doctrine.[11] The panel opinion, adopted *en banc*, stated that in *Kelly:*

> "The United States Supreme Court, reversed, holding that the present cash value of future earnings is the proper measure of recovery in

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10 *Williams v. United States*, 435 F.2d 804, 807 (1st Cir. 1970); *Yodice v. Koninklijke Nederlandsche Stoom. Maat*, 443 F.2d 76, 79 (2d Cir. 1971); *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294, 301 (3rd Cir. 1972); *Frankel v. Heym*, 321 F.Supp. 1331, 1346, 466 F.2d 1226 (3rd Cir. 1972); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 143-144 (3rd Cir. 1974) and discussion on remand at 374 F.Supp. 850, 852-855 (M.D.Pa. 1974); *Sleeman v. Chesapeake & Ohio Railway Co.*, 414 F.2d 305, 308 (6th Cir. 1969); *Petition of U.S. Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), cert. denied, 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971), cert. denied, 402 U.S. 987, 91 S.Ct. 1660, 29 L.Ed.2d 153 (1971), cert. denied, 402 U.S. 987, 91 S.Ct. 1665, 29 L.Ed.2d 153 (1971), reh. denied, 403 U.S. 924, 91 S.Ct. 2227, 29 L.Ed.2d 703, reh. denied, 403 U.S. 940, 91 S.Ct. 2247, 20 L.Ed.2d 720 (1971); *Furimizo v. United States*, 245 F.Supp. 981, 1013 (D.Hawaii 1965), aff'd., 381 F.2d 965, 971 (9th Cir. 1967).

11 Same interpretation, see *Sleeman, supra*, 414 F.2d 305, 307 (6th Cir. 1969).

actions brought under the Act." (510 F.2d 234, at 239).

The Fifth Circuit has held that the discount rate to be used should be the rate on long term conservative investments at the time and place of trial (510 F.2d 234, 237). This is synonymous with the established jurisprudence as reflected in the 1939 *Restatment of Torts*, Sec. 924, p. 631:

> "In ascertaining the present worth of the future loss of earnings, that is in discounting the recovery because future losses are paid for in advance, the rate of discount is based upon the *current return* upon long term investments if the perspective losses are long continued." (p. 634-635) (Emphasis supplied)

The Fifth Circuit *en banc* incorporated the panel opinion which discussed the *Restatement of Torts* and *Kelly* (510 F.2d 234, 239-240). The Court specifically concluded that on re-trial the discount rates to be applied shall conform with the Supreme Court's comments in *Kelly* and its decision in *Blue v. Western Railway of Alabama*, 469 F.2d 487 (5th Cir. 1972), as modified. (510 F.2d 234, 241)

The Fifth Circuit did not unequally apply the law as Petitioners contend. The trier of fact should not consider the speculative influence of possible future inflationary or deflationary trends over decades in projections of future lost earnings or in projection of the discount rate. To achieve reasonable certainty and to promote efficient administration of justice, the Court decided that such forecasting should be eliminated as

beyond judicial determination and that damage awards should be based on current dollars at current discount rates.

There is no inconsistency. It is entirely speculative to judicially attempt to forecast wage rates in the future as influenced by monetary trends. There is no present market to delineate long term wages over 10, 20, or 30 years. And, any conjecture based on subjectively selected factors can be controverted by exogenous economic influences; for instance, governmental policy. This is distinct from the determination of the discount rate by the market place, which sets long term rates over decades into the future. A particular security, bond or annuity can be purchased today affording a fixed rate of return. The rate is available at the time of trial; it is certain; it is known over the balance of work life expectancy. It makes no quantative difference whether a person receives the money as it is earned in the future or the same amount now in a lump sum discounted to present value at a rate of interest actually available to him.[12]

The *en banc* opinion avoids extreme speculations on future monetary trends both in their possible impact upon future lost earnings and upon future discount rates. Following historical principles, future earnings are to be reduced to present value by use of an appropriate interest rate prevailing at the time and place of trial. (510 F.2d 234, 237)

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12 In *Kelly*, *supra*, p. 13, reduction to present value also utilized interest rates available on long term investments, including securities, bonds or annuities.

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In accord with *Kelly*, the *Restatement of Torts*, and *Penrod*, the discount rate will be a conservative rate on present long term investments consistent with the background and experience of the individual. It will be a rate not subject to the fluctuations of monetary trends, a rate scaled and in keeping with safe investments which require the least care and yield a relatively moderate return. Thus, lump sum awards for lost earnings are discounted at an interest rate available to Petitioners when received. Should Petitioners elect not to utilize available long term interest rates, i.e. they think they can exceed that rate of return by making short term, periodic investments, they may gain a greater return if high inflation occurs, a lesser return if deflation or lower inflation occurs, or stay even.

Despite Petitioners' contentions, the decision of the Fifth Circuit Court of Appeals does not prohibit consideration of future increases in Petitioners' earnings. As has always been true, it simply requires that future damage awards be based on competent evidence of Petitioners' individual earnings record and prospects. Petitioners want to substitute entirely speculative evidence for the traditional measures of a man's damages.

Petitioners cite *Gruenthal v. Long Island RR Co.*, 393 U.S. 156, 89 S.Ct. 331 (1968) as conflicting. The issue in *Gruenthal* was whether the second Circuit should have disturbed a jury verdict as excessive. This Court reviewing the facts said no — the verdict did not constitute a denial of justice. The issue at bar was never involved.

We note Petitioners' contention that with allegations of diversity of citizenship the law of the state should control the measure of damages. We doubt that it is seriously urged. The fact that diversity also forms the basis of jurisdiction does not make the forum state's law applicable. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-411, 74 S.Ct. 202 (1953); *Streatch v. Associated Container Transp., Ltd.*, 388 F.Supp. 935, 937-38 (C.D. Cal. 1975). In claims arising under Federal law, such as the Federal Employers' Liability Act, the Jones Act, or unseaworthiness, the cause of action is Federally created and damages are to be measured by Federal law.[13]

CONCLUSION

The *en banc* decision of the Fifth Circuit adheres to established jurisprudence in assessing the present value of future earnings and regarding the right to trial by jury preserved to litigants. It conflicts with no decision by this Court or another Circuit Court and

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13 *Chesapeake & Ohio Ry. Co. v. Kelly*, *supra*, p. 13; *Mondou v. New York, New Haven & Hartford RR Co.*, 223 U.S. 1, 32 S.Ct. 169 (1911); *Chicago, M. & St. P. Ry Co. v. Coogan*, 271 U.S. 472, 46 S.Ct. 564 (1926); *Dice v. Akron, Canton & Youngstown RR Co.*, 342 U.S. 359, 72 S.Ct. 312, 314 (1952); *Ellis v. Union Pacific RR Co.*, 329 U.S. 649, 67 S.Ct. 598, 599 (1947); *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305, 307 (6th Cir. 1969); *Hall v. Minnesota Transfer Ry Co.*, 322 F.Supp. 92, 95; *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 535 (9th Cir. 1962); *Mascuilli v. United States*, 411 F.2d 867, 872 (3d Cir. 1969); *In Re Farrell Lines, Ltd.*, 339 F.Supp. 91, 93. (E.D.La. 1971); *Isgett v. Seaboard Coast Line RR Co.*, 332 F.Supp. 1127, 1142 (D.S.C. 1971).

raises no substantial issues that warrant review on writ of certiorari. The Petitions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of August, 1975.

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BLEED T